Supreme Court, U.S.
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Nos. 88-1893 and 88-7305

In the Supreme Court of the United States

OCTOBER TERM, 1989

GAIL MARIE KING, PETITIONER

v.

UNITED STATES OF AMERICA

RANDALL WILLIAM FOWLER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the indictment charged that the victims of petitioners' scheme to defraud were deprived of money or property within the meaning of 18 U.S.C. 1341 as interpreted by this Court in *McNally* v. *United States*, 483 U.S. 350 (1987).

2. Whether petitioner Randall Fowler was denied due process in his sentencing proceeding.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-4a)[1] is unreported.

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[1] "Pet. App." refers to the appendix to the petition filed by petitioner King in No. 88-1893.

JURISDICTION

The judgment of the court of appeals was entered on February 24, 1989. A petition for rehearing was denied on March 23, 1989. The petitions for a writ of certiorari were filed on May 22, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Western District of North Carolina, petitioners were convicted of participating in a mail fraud conspiracy that involved the sale of bogus university degrees and transcripts, in violation of 18 U.S.C. 371. In addition, petitioner Randall Fowler was convicted on two counts of mail fraud and three counts of aiding and abetting mail fraud, and petitioner Gail King was convicted on ten counts of mail fraud, all in violation of 18 U.S.C. 1341. C.A. App. 1481-1487. Petitioner Fowler was sentenced to seven years' imprisonment and was fined $10,000. Petitioner King was sentenced to three years' imprisonment and was fined $3,000. C.A. App. 1628-1629. The court of appeals affirmed. Pet. App. 1a-4a.

1. The evidence at trial showed that petitioners and their co-defendants operated a fraudulent scheme to market and sell bogus diplomas and transcripts from nonexistent "universities" named after legitimate, accredited institutions. For example, an FBI agent responded to an advertisement in *The National Enquirer* offering college degrees by mail. In response, he received from petitioner Gail King a brochure describing the "Advanced Study Program" of "DePaul University." The brochure represented that "DePaul University is a major public University offering fully accredited Associate degrees, Masters degrees, Ph.D.'s (all with transcripts), entirely through evaluation

of your current knowledge and life experiences." C.A. App. 2194. All that an applicant needed to provide was "a resume of life work, educational experiences or a written authored published work," the brochure stated, along with the required tuition. *Id.* at 2195. The brochure represented that DePaul was accredited by the Worldwide Accrediting Commission, which does not exist. The agent completed the application form in the brochure, indicating that he was an accountant who "admired the legal profession" and sought a "bachelor of laws" degree. He enclosed a check for $600 and asked that the degree be backdated to 1959. *Id.* at 2203-2206. The agent was awarded the degree and given phony transcripts.

Petitioner Randall Fowler ran "Loyola University." The evidence showed that a postal inspector purchased a "bachelor of science in business administration" degree from Fowler, along with a Loyola transcript reflecting the inspector's performance in courses he never took. GX 87.

2. The indictment, which was returned prior to this Court's decision in *McNally* v. *United States,* 483 U.S. 350 (1987), charged in part that petitioners had schemed to defraud United States citizens "of their expectation of properly educated, competent, appropriately trained and tested, and otherwise qualified, legal, educational, psychological, engineering, business, and health" personnel. C.A. App. 14.[2] Petitioners challenged this "intangible rights" allegation before trial by moving to dismiss the indictment. The district court, after reciting the language quoted above, stated that, "[n]othing else appearing, this might well entitle the defendants to the relief sought." Pet. App. 6a. "However," the court continued, "much else does

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[2] The indictment is reprinted in the Appendix to No. 88-7305. As reprinted in that appendix, the indictment contains the page numbers it was given in the court of appeals appendix.

appear." *Ibid.* For example, the court noted, the indictment alleged that petitioners " 'well had reason to believe . . . that certain graduates would erroneously believe that the degrees . . .' were valid equivalents of other degrees." *Id.* at 7a (quoting a portion of the indictment reprinted at C.A. App. 19). Accordingly, the court held, "the portions of the indictment attacked by the defendants are at worst surplusage and as *McNally* points out can be taken out of the case upon appropriate trial motions and jury instructions." Pet. App. 7a. The government proceeded to try the case on the theories (also contained in the indictment) that petitioners had defrauded innocent individuals of tuition money and had defrauded employers who extended jobs and pay raises to holders of bogus degrees. The intangible rights language was redacted from the indictment in the jury charge.

3. On appeal, petitioners primarily argued that they had been charged with a single conspiracy while the evidence showed multiple conspiracies, and that they had been prejudiced by the introduction of evidence concerning degrees granted by the "University of England at Oxford" and the "University of Southern California," bogus diploma mills operated by unindicted persons. The court of appeals rejected their claims, noting that the jury had been instructed that it was to disregard evidence concerning the University of England at Oxford and the University of Southern California and that the government was required to prove a single conspiracy. Pet. App. 3a-4a. With respect to the issues petitioners contend warrant review by this Court, the court of appeals concluded simply that their contentions were "without merit and do not warrant discussion." *Id.* at 4a.

ARGUMENT

1. Petitioners, alleging that the indictment included intangible rights charges only, contend that they were convicted of crimes not charged in the indictment. There is no factual basis for this contention, which was rejected by both lower courts.

As the district court stated (Pet. App. 6a), the indictment included intangible rights allegations. However, as the district court also concluded (*id.* at 6a-7a), the indictment charged more than that. Specifically, the indictment alleged that some purchasers of diplomas would be deceived by petitioners' scheme and "would erroneously believe that the degrees, diplomas, and certificates would be equivalent to such degrees, diplomas, and certificates of traditional, legitimate, accredited colleges and universities throughout the world." C.A. App. 19. Thus, the indictment charged that some persons would believe that their life experiences qualified them for the degrees they sought and would pay their "tuition" in good faith.[3]

The indictment further alleged that persons who purchased bogus credentials would present them "to em-

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[3] The evidence presented at trial proved that allegation. Among the numerous innocent purchasers victimized by the scheme was the Reverend James Johnson, who believed that "Roosevelt University" was a legitimate institution with a faculty that would give credit for his 20 years of experience in the ministry and prior academic work. He accordingly paid more than $500 for a worthless "master of divinity" degree from Roosevelt. C.A. App. 775-777. Calvin Gregory, an insurance agent who paid $730 to purchase a "Cromwell University" degree, wrote to the "West European Accrediting Society" to confirm Cromwell's status. He received a computer print-out (purportedly from the accrediting agency but actually from petitioners) stating that Cromwell was a fully accredited institution with an "A-1" rating. Gregory thus believed that he was dealing with a legitimate institution. C.A. App. 809-811, 821.

ployers, organizations, institutions and individuals seeking legal, health, educational and other professional advice, consultation, and counselling, as well as to the public at large, to the detriment and deceit of such employers, organizations, and individuals, including competing coworkers or fellow employees, and to the detriment of the public at large." C.A. App. 19. Thus, the indictment charged that as a result of petitioners' scheme both employers and the general public would not get what they paid for—the assistance of properly trained individuals.[4]

In addition, each of the mail fraud counts alleged that the purpose of the scheme was to obtain money. See, *e.g.*, C.A. App. 24. The indictment therefore "fairly inform[ed petitioners] of the charges against which [they] must defend." *United States* v. *Bailey*, 444 U.S. 394, 414 (1980) (quoting *Hamling* v. *United States*, 418 U.S. 87, 117 (1974)).

Petitioners' Fifth Amendment right to indictment by a grand jury was not violated by the district court's removal of the invalid intangible rights theory from the indictment. In *United States* v. *Miller*, 471 U.S. 130 (1985), this Court rejected a Fifth Amendment challenge where the defendant was convicted of a fraudulent scheme narrower and more limited than, but included within, the allegations of the indictment. "As long as the crime and the elements of the offense that sustain the conviction are fully and clearly

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[4] The evidence at trial showed that employers provided jobs and promotions based on degrees issued by petitioners' institutions. Kathryn Mary Finlay, a teacher at St. Joseph's School in Collingdale, Pennsylvania, received a substantial pay raise based upon her DePaul degree. C.A. App. 1040-1047. James Kenneth Ballard used his DePaul degree to obtain teaching certification, a substantial salary increase, and a promotion to school principal. *Id.* at 912-922. The niece of Chicago pastor Paul J. Evans also obtained a teaching job on the basis of a DePaul degree. *Id.* at 839, 851.

set out in the indictment, the right to a grand jury is not normally violated by the fact that the indictment alleges more crimes or other means of committing the same crime." *Id.* at 136. Here, as in *Miller,* petitioners were convicted on account of a fraudulent scheme more limited than that charged, but one that was nevertheless clearly alleged in the indictment.[5]

In any event, petitioners' contention that the decision below conflicts with *McNally* is of no continuing importance. Congress has amended the mail and wire fraud statutes to provide that a " 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right to honest services." Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7603, 102 Stat. 4508. The legislative history of this provision expressly states that it was intended to overturn *McNally.* 134 Cong. Rec. S17,376 (daily ed. Nov. 10, 1988). There is no doubt that petitioners' conviction would be valid under current law, because the evidence showed that as a result of the scheme employers and the general public were deprived of honest services from persons holding the credentials they claimed to have earned. Accordingly, petitioners' claim does not warrant review by this Court.

2. Petitioner Randall Fowler also seeks review of his claim (88-7305 Pet. 18-21) that his sentence was based on an erroneous estimate of the revenues of the diploma fraud. There is no merit to that fact-bound claim.

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[5] It is therefore clear that this is not a case in which there was an attempt to satisfy *McNally* through jury instructions alone. Thus, contrary to King's claim (88-1893 Pet. 9-11), the court of appeals' decision is not in conflict with either *United States* v. *Santa-Manzano,* 842 F.2d 1, 3 (1st Cir. 1988), or *United States* v. *Italiano,* 837 F.2d 1480 (11th Cir. 1988), where the theory presented to the jury was not contained in the indictment.

At Fowler's sentencing hearing, an FBI agent estimated that the fraudulent scheme netted about half a million dollars. Oct. 25, 1987, Tr. 2365. At a subsequent hearing for the other defendants, the United States Attorney, on the basis of an intervening report by the Internal Revenue Service, estimated that the diploma mills had generated revenues of about $600,000. About half of that sum was obtained during the time period covered by the indictment. Nov. 2, 1987, Tr. 22-23.

Fowler was properly sentenced. It is well settled that matters not charged in the indictment may be considered in imposing sentence. *Williams* v. *New York,* 337 U.S. 241, 244 (1949); *United States* v. *Bernard,* 757 F.2d 1439, 1444 (4th Cir. 1985); *United States* v. *Campbell,* 684 F.2d 141, 154 (D.C. Cir. 1982); *United States* v. *Sweig,* 454 F.2d 181 (2d Cir. 1972). Since the scheme generated about $600,000, Fowler was not prejudiced because the court relied on the $500,000 estimate in sentencing him. In any event, nothing in the record suggests that he would have received a lighter sentence had the monetary figure been scaled down from $500,000 to $300,000. Accordingly, this issue does not warrant further review by this Court.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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